IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 228 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

BHAVARLAL D PRAJAPTI

Versus

STATE OF GUJARAT

Appearance:

MR MR VYAS for appellant

MR S.T.MEHTA APP for Respondent

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 02/07/98

ORAL JUDGEMENT

1. In this criminal appeal, the appellant/ original accused has brought in challenge the judgment and order dated 12.1.1994 recorded by the learned Additional City Sessions Judge, Ahmedabad in Sessions Case No. 120 of 1993 whereby the appellant/ original accused was convicted for an offence punishable under Section 376 (2) (f) of the Indian Penal Code ('IPC' for short) for committing rape on a minor girl aged about 4 years and

sentenced him to suffer rigorous imprisonment for seven years and to pay fine of Rs.1,000/- and in default of payment of fine, to undergo rigorous imprisonment for further three months.

2. The prosecution case in nut-shell is as under:

2.1 The complainant, Naranbhai Nathaji, father of the victim - minor girl Bhavna, was residing at Gheewali Lane, Chamanpura, Ahmedabad with his family. He and his wife both were doing the labour work of cutting areca-nut. On the day of the alleged incident, at about 8 P.M. after taking their evening meal, Shantaben, wife of the complainant, went out to purchase kerosene. At about 8.30 and 8.45 P.M., when the complainant was going to sleep, one Bhavarlal inquired whether the complainant was sleeping or awoke. Said Bhavarlal, aged about 30 to 32 years, was residing in the same lane and serving at Asarwa Mills. Said Bhavarlal was acquainted with the family members of the complainant and occasionally he was taking Bhavna, the daughter of the complainant, out of the house and used to give her chocolate and they had trust on him. Bhavarlal called the daughter of the complainant and took her away for giving her chocolate. In the meantime, wife of the complainant came back as kerosene was not available and inquired about Bhavna. The complainant told that Bhavarlal had taken her out. Wife of the complainant went to the lane in search of her daughter. After about half an hour, she returned frightened and told the complainant that there was profuse bleeding from the vagina of Bhavna which was flowing over her legs. On hearing the shouts of the complainant, residents of the lane assembled there. The complainant alongwith one Punambhai Prajapati thereafter took Bhavna to police station in an auto rickshaw. From the police station with police yadi the complainant took the victim minor girl to hospital for treatment where she was admitted in emergency ward.

2.2 The complainant in his complaint stated that said Bhavarlal came to his house at about 8.30 P.M. and took his daughter Bhavna to unknown place and committed brutal rape on the minor girl aged about 4 years and caused grievous injury on her vagina and fled away. The aforesaid complaint was given before the Police Sub Inspector, Meghaninagar Police Station on 18.1.1993 immediately after the occurrence wherein the complainant inter alia alleged that said Bhavarlal has committed rape on her minor girl.

2.3 The complaint was registered and investigation

was put on motion. In the course of investigation the investigating officer recorded statement of number of witnesses, recovered the frock of Bhavna which was put on by her at the time of commission of offence, by drawing panchnama in presence of panchas. The investigating officer arrested the accused Bhavarlal on 19.1.1993. Panchnama of the person of the accused was drawn and also recovered the blood stained banian and underwear from the accused in presence of panchas. On the accused expressing willingness to show other cloths and the place where he committed rape upon the victim, the investigating party along with panchas had gone there and recovered blood stained mattress, pant and shirt and panchnama under Section 27 of the Indian Evidence Act ('the Act' for short) was also drawn in presence of panchas. Thereafter the investigating officer sent the recovered muddamal to the Forensic Science Laboratory for analysis. He also got examined the person of the accused. After that the investigation was entrusted to Police Inspector Mr. Chauhan who filed charge-sheet against the accused for the commission of the alleged crime.

3. The case was committed to the City Sessions Court of Ahmedabad. The learned Additional City Sessions Judge, Ahmedabad, framed charge against the accused which was read over and explained to him to which the accused pleaded not guilty and claimed to be tried.

4. In order to bring home the charge levelled against the accused, prosecution has examined in all 14 witnesses and placed reliance on 13 relevant documents. After recording the evidence of prosecution witnesses further statement of the accused under Section 313 of the Criminal Procedure Code ('the Code' for short) was recorded.

5. After recording and appreciating the evidence of the prosecution witnesses, the learned Additional Sessions Judge came to the conclusion that the accused has committed offence of rape on the minor girl aged about 4 years and the guilt of the accused is proved beyond doubt. The learned trial Judge, therefore, recorded the finding of conviction of the offence punishable under Section 376 (2) (f) of the IPC and awarded the sentence, as aforesaid.

6. Feeling aggrieved by the aforesaid judgment recording conviction and sentence, the appellant/accused has preferred this appeal before this Court.

7. Learned advocate Mr. M.R. Vyas has vehemently contended that the evidence of the prosecution witnesses with respect to the place and time of offence is bristled with material contradictions and hence no reliance can be placed on the oral testimony of the prosecution witnesses. He further contended that the recovery panchnama in respect of the blood stained cloth of the accused and the discovery panchnama which was drawn on the willingness of the accused both are not according to law and no reliance can be placed upon the same. He further submitted that medical evidence of the doctor who examined the victim was also not properly appreciated by the learned trial Judge wherein the doctor has specifically stated that hymen could be torn by inserting finger in vagina and it was the case of the accused from the very beginning that he tried to insert his finger in the vagina of the victim and hymen might have torn on his such attempt. The accused had also disclosed this fact before the doctor who examined him on the very next day. According to Mr. Vyas, the learned trial Judge has committed grave error in not believing the theory propounded by the accused.

8. In view of the aforesaid state of affairs runs the further submission that the prosecution has miserably failed to prove the charge levelled against the accused. According to Mr. Vyas, at the most it can be said to be a case of the accused injuring vagina of the victim by inserting his finger and in that process hymen was torn. Mr. Vyas, therefore, prayed that this appeal may be allowed and the judgment and order recording conviction and sentence may be quashed and set aside by acquitting the appellant/accused.

9. In counter submission, learned A.P.P. Mr. S.T. Mehta with all his vehemence submitted that from the circumstantial evidence the prosecution has proved the guilt of the accused beyond reasonable doubt. It is true that no witness has seen the incident. But the circumstances are such that no doubt could be raised about the commission of the crime by the accused. The discovery panchnama prepared under Section 27 of the Act also suggests that only the accused has committed the heinous crime and the blood stained clothes found from the accused also clearly establishes that the said crime was committed by the accused only and none else. It is also established that the accused was frequently visiting the house of the complainant and often used to take the victim out with him. Therefore, there was no enmity between the complainant and the accused so as to suggest that the complainant has falsely implicated the accused

in the crime. Under these circumstances, Mr. Mehta, learned A.P.P. submitted that the judgment and order of conviction and sentence do not require any interference by this Court and on the contrary, it requires affirmation.

10. As per the prosecution case, nobody saw the accused committing rape on the minor girl. Therefore no witness can be said to be an eye witness. Under the circumstances, the prosecution has placed reliance on the circumstantial evidence of the material witnesses to prove the guilt of the accused.

11. P.W. 1, Naranbhai Nathaji Mali, the complainant - father of the victim girl, in his testimony at Ex.6, has narrated the incident as per the statement made by him in the complaint. He has unequivocally testified that the accused was residing in the same lane in which he and his family were residing and occasionally the accused used to come to his house and take away his daughter Bhavna for giving her chocolate. On the day of the incident also the accused came to his house and took Bhavna away for giving her chocolate. It is, therefore, clear that prior to rape on Bhavna, the accused had taken her away. Nothing substantial was brought out from the cross-examination of this witness. Thus, from the evidence of the complainant, the first link of the chain of the circumstantial evidence is established.

12. P.W.2, Shantaben, the wife of the complainant and mother of the victim, in her evidence recorded at Ex.15, testified that after her return to house she inquired about Bhavna. The complainant told her that Bhavarlal had taken her away. She, therefore, went out in search of Bhavna. She found Bhavna coming from the house of Bhavarlal and she was crying. There was profuse bleeding from vagina of Bhavna and blood was flowing over her legs. On seeing it, she frightened and informed her husband - the complainant, about it. It is pertinent to note that during cross-examination of this witness nothing substantial was brought out which could suggest or even whisper that this witness is telling lie.

13. Another witness on whose oral testimony the prosecution has placed reliance is P.W.3, Jagdish Babubhai Jaiswal. His evidence was recorded at Ex.16. This witness was also doing labour work of cutting areca-nut. On the day of the alleged incident, at about 9.45 P.M., he was eating 'bhajia' from the larry of Maheshbhai. At that time he saw Bhavna with Bhavarlal. He testified that thereafter people gathered on the road.

Bhavna was crying and there was profuse bleeding over her legs.

14. To connect the links of circumstantial evidence, prosecution has examined Khemchand Chunilal, P.W.10, at Ex.29. He has inter alia testified in his examination-in-chief that he was running business in the name and style of "Chunilal Dudhalaya" selling milk and 'penda'. On 18.1.1993 he and his brother Triloksinh both were present in the shop. Between 9.30 to 10 P.M. Bhavarlal came to his shop with one girl. He purchased two glasses of milk and 100 grams of penda. Bhavarlal gave one glass of milk to the girl and he consumed another glass of milk. Both of them had eaten penda. From the evidence of Khemchand also it is duly proved that from 9.30 P.M. to 10 P.M. the victim girl was with Bhavarlal.

15. Evidence of the aforesaid four witnesses including the complainant go to show that Bhavarlal had taken away Bhavna on the day of the alleged incident at about 8.45 P.M. from the house of the complainant. Witnesses Jagdish and Khemchand also supported the prosecution version that Bhavna was with Bhavarlal at the relevant time.

16. So far as the medical evidence is concerned, prosecution has place reliance on the evidence of P.W.9, Dr. Vinodkumar Lajaram, which was recorded at Ex.27. He had examined the victim clinically on the same day at 11 P.M and certificate was also issued by him which is on record at Ex.28. According to the doctor, the victim was conscious and her general condition was fair. Pluses were found to be 88/mt. which, according to the doctor, could be said to be normal. Secondary sex character was not developed. No external marks were seen over the body of the victim. P/Valval two small blood clot were seen. Active bleeding was not found at the time of examination. 2 cm. perineal tear was seen. Hymen was found freshly torn. Frayed margin was seen. Vaginal swab for spermatozoa was taken but spermatozoa was not detected. Urethral swab for gonococci was taken but gonococci was not present.

17. It is interesting to note that during the examination-in-chief, the doctor has unequivocally stated that by inserting finger in vagina hymen could be ruptured but perineal tear was possible only by sexual intercourse. On examination of the victim, the doctor had noticed two cm. perineal tear. Therefore, the defence put up by the accused that while returning from

Khemchand's shop after giving the minor girl milk and penda a wicked intention arose in his mind and he inserted his finger in the vagina of the minor girl, is falsified. Evidence of the doctor clearly suggests that Bhavna was ravished and because of that only, the 2 cm. size perineal tear was seen. According to the doctor, this injury was possible only by sexual intercourse and not by inserting finger in vagina. Therefore, undisputedly she was ravished and it is not difficult to answer by whom she was ravished because in this regard we have discussed the evidence at length while discussing the evidence of the complainant - father of the victim, Shantaben mother of the victim, Jagdish and Khemchand.

18. Another important piece of evidence is the panchnama of the person of the accused as well as discovery panchnama. Panch witness, Prakash Chhaganlal in whose presence panchnama of the person of the accused was prepared and the blood stained banian and underwear which were put on by the accused were recovered, has supported the prosecution in examination-in-chief but not supported during cross-examination. But that fact by itself is not sufficient to disprove the panchnama Ex.21. As per panchnama both the clothes were found with blood stain. As per report of Forensic Science Laboratory the blood stain found in the underwear was of 'B' group. Similarly, frock of the victim was stained with blood of 'B' group so also the mattress.

19. It may be mentioned that the panch witness in whose presence the discovery panchnama as per Section 27 of the Act was drawn, has supported the prosecution throughout. P.W.8, Raghevandra Ramchandra Tivari, was examined at Ex.28. In presence of this witness the accused had expressed willingness to show the place where he committed rape on the minor girl and blood stained articles were also discovered. As per his oral testimony, the accused had taken both the panchas and the investigating party to Kelaram's room and there he showed the cot upon which he committed rape. From there a mattress, one shirt and a pant, all stained with blood were discovered and Panchnama Ex.26 was prepared in presence of panchas.

20. On over all appreciation of the evidence of panch witness vis-a-vis panchnama and considering the panchnama prepared under Section 27 of the Act, no doubt could be raised about the panchnamas. Therefore, on overall appreciation of the prosecution evidence, the medical evidence and the evidence of the panchas, all the links in the chain of circumstantial evidence are duly

established by the prosecution. It is duly proved that the brutal and heinous crime which can never be pardoned was committed by the accused only. In the circumstances, the learned trial Judge has rightly appreciated the evidence adduced and produced before him. On the basis of this evidence no other conclusion could be possible except the one which the learned trial Judge has arrived at.

21. In view of these facts and circumstances, this Court has no hesitation in coming to the conclusion that finding of conviction recorded by the learned trial Judge against the accused is in consonance with the evidence adduced and produced before him and it does not require any interference by this Court.

22. This takes me to the question regarding awarding of sentence. The statute has prescribed minimum sentence of ten years and maximum sentence of R.I. for life for the offence punishable under Section 376 (2) (f) of IPC. However, the statute has also provided that in the given set of circumstances less sentence than the minimum sentence prescribed can be awarded for which the Presiding Judge must mention in his judgment adequate and special reasons and without recording it less sentence than the minimum prescribed cannot be awarded.

23. The learned advocate for the appellant Mr. Vyas submitted that the accused was aged about 32 to 34 years. He has a wife and three children who are infants. The accused has already undergone sentence of more than 5 years. Therefore the sentence undergone may be treated as substantive sentence and the appellant/accused may be set at liberty by showing mercy on him. As against this learned A.P.P. Mr. Mehta has vehemently submitted that no leniency should be shown, otherwise this will put a bad example in the society. Family background is not a good ground for taking lenient view. In the circumstances of the case, the learned trial Judge has awarded less sentence than the minimum sentence prescribed by the statute by assigning reasons in the judgment which does not require interference.

24. On this aspect, after giving my anxious thought I am of the opinion that no leniency could be shown to the accused by reducing sentence because an innocent hapless girl, aged about 4 years only, under the pretext of giving her chocolate, was taken away and was subjected to such a barbaric and heinous treatment by a person who was in a position of her trust his culpability assumes the proportion of extreme depravity and arouses a sense of

revulsion in the mind of the common man. The accused was not a novice for enjoyment of sex. He has a wife and three children. Enjoyment of sex should not be entertainment for him and that too with a minor hapless girl. Therefore, crime committed by the appellant/accused can never be pardoned. As per the law laid down by the Apex Court of the country, family background is not a ground for awarding less sentence. Further more, even though the statute prescribes minimum sentence of ten years the learned trial Judge has awarded sentence of only 7 years by invoking proviso which permitted him to award less sentence than the minimum sentence prescribed, by assigning special and adequate reasons. When the learned trial Judge has already taken a lenient view again at the appellate stage for second time no leniency can be demanded and, if demanded, cannot be considered. Under the circumstances, the prayer for awarding less sentence than the one awarded by the learned trial Judge is devoid of any merit and cannot be given countenance and hence it is rejected.

25. In the result, the appeal requires to be dismissed and accordingly it is dismissed.
